

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41S 30154162 BY STEVE AND KRISTY MORGAN)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On November 17, 2021, Steve and Kristy Morgan (Applicant) submitted Application for Beneficial Water Use Permit No. 41S 30154162 to the Lewistown Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 11.97 acre-feet (AF). The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated March 1, 2022. The Applicant responded with information dated March 17, 2022. The Application was determined to be correct and complete as of June 21, 2022. The Department met with the Applicant on November 17, 2021. An Environmental Assessment for this Application was completed on October 7, 2022. A Technical Report was completed on June 21, 2022.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Surface Water Application for Beneficial Water Use Permit, Form 600-SW
- Storage Addendum, Form 600 SA
- Maps: Two aerial photo maps of the proposed project location and surrounding area, one hand-drawn diagram of approximate reservoir shoreline contours
- Monthly stream flow measurements collected in the area of the proposed project from November 20, 2020 through November 3, 2021

Information Received after Application Filed

- Deficiency Response Dated March 15, 2022

Information within the Department's Possession/Knowledge

- DNRC Deficiency Letter, dated March 1, 2022
- DNRC Technical Report, dated June 21, 2022
- Lewistown Airport precipitation and evaporation data
- Penman/Linacre Method Evaporation Data for Lewistown Airport
- DNRC surface water right records
- USGS Thornthwaite Water Balance Model Output
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Lewistown Regional Office at 406-538-7459 to request copies of the following documents.
 - DNRC Physical Availability of Ponds Memo dated April 22, 2019
 - DNRC Physical Availability of Surface Water Without Gage Data Memo dated April 18, 2019
 - DNRC Private Fish and Wildlife Appropriations under the Water Use Act Memo dated January 22, 1986

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to impound 7.2 AF of surface water for stock and fishery purposes from an Unnamed Tributary of Casino Creek from January 1 through December 31 per year by means of a dam located in the SWNWNW of Section 16, Township (T) 14 North (N),

Range (R) 18 East (E) in Fergus County. The proposed volumes for the stock and fishery purposes are 0.17 AF and 11.8 AF, respectively. The proposed place of use is generally located in the SWNWNW of Section 16, T14N, R18E. The proposed storage reservoir has a surface area of 1.5 acres and a storage capacity of 7.2 AF. The maps below show the elements of the proposed project.

Map 1 – Proposed Reservoir Location



Map 2 – Proposed Source on Unnamed Tributary of Casino Creek



2. The proposed appropriation is located in the Judith River Basin (Basin 41S) which is not subject to any administrative water right basin closures.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

3. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, § 3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

4. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding

must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth

in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

5. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further

compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

6. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

Memorandum and Order (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

7. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

8. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

9. The Applicant proposes to divert an annual volume of 11.97 AF of surface water from Unnamed Tributary of Casino Creek in Fergus County for stock and fishery purposes. Unnamed Tributary of Casino Creek is a non-perennial stream according to USGS and streamflow measurements collected by the Applicant were submitted with the Application. These measurements were incomplete, and some months were missing due to ice, and as a result, none of these measurements were used. A variance from the water measurement requirements in ARM 36.12.1702 was requested by the Applicant on March 9, 2022. A combination of precipitation data from the Western Regional Climate Center collected at the Lewistown, MT Municipal Airport from 1981-2010 and the USGS Thornthwaite Monthly Water Balance Model (2007) were considered to estimate potential evaporation and the monthly volume of water available at the proposed point of diversion.

10. The USGS Thornthwaite model is an accepted method for determining annual runoff from non-perennial streams in Eastern and Central MT.

11. Mean monthly temperature and precipitation information was obtained from the Lewistown, MT Airport weather station. In the Thornthwaite user interface, the latitude was set to 47 degrees north and the elevation was set to 1200 meters above sea level (AMSL). The inputs considered in the Thornthwaite method include mean monthly temperature, total monthly precipitation, and latitude of the location of interest. This model generates the amount of direct runoff at the location of interest which is then multiplied by the basin area to calculate an annual runoff volume. The area of the drainage basin above the Unnamed Tributary of Casino Creek point of diversion is approximately 212 acres based on mapping in the USGS StreamStats Montana program. Based on this approach, the Department finds the annual volume of runoff

above the proposed POD is 32.4 AF (0.04 CFS). Table 1 summarizes the monthly runoff data found in the Department's physical availability assessment.

Physical Availability – Volume (CFS)

**Table 1. Thornthwaite model runoff (RO) output: Lewistown, MT Municipal Airport
Weather Data, Lat 47 Degrees, elevation 1200 meters AMSL**

LEWISTOWN MUNI AP, MONTANA, 1200M ABV SL								
Month	Mean Temp (F)	Temp (Degree C)	Mean Precip (in)	Precip (mm)	RO Total (mm)	Inches	feet	AF/Month
January	23.60	-4.67	0.57	14.48	12.70	0.50	0.04	8.00
February	25.70	-3.50	0.44	11.18	6.30	0.25	0.02	3.97
March	32.90	0.50	0.99	25.15	3.60	0.14	0.01	2.27
April	41.40	5.22	1.41	35.81	3.40	0.13	0.01	2.14
May	50.00	10.00	2.85	72.39	8.60	0.34	0.03	5.42
June	58.10	14.50	3.08	78.23	6.40	0.25	0.02	4.03
July	65.50	18.61	1.93	49.02	3.70	0.15	0.01	2.33
August	65.10	18.39	1.73	43.94	2.80	0.11	0.01	1.76
September	54.90	12.72	1.35	34.29	2.00	0.08	0.01	1.26
October	43.70	6.50	1.13	28.70	1.60	0.06	0.01	1.01
November	32.00	0.00	0.71	18.03	0.30	0.01	0.00	0.19
December	23.30	-4.83	0.66	16.76	0.00	0.00	0.00	0.00
							TOTAL VOLUME (AF/YR)	32.38
							TOTAL FLOW RATE (CFS)	0.04

12. The Department finds that the amount of surface water the Applicant seeks to appropriate 11.97 AF is physically available in the Unnamed Tributary of Casino Creek.

CONCLUSIONS OF LAW

13. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

14. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

15. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

16. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 9-11)

Legal Availability:

FINDINGS OF FACT

17. The Applicant proposes to appropriate an annual volume of 11.97 AF of water from an Unnamed Tributary of Casino Creek for stock and fishery purposes. There are no other appropriations on this source. The Department finds that the amount of water legally available on the proposed source of supply is equal to the amount of water physically available. The Department finds that the 11.97-AF volume of surface water the Applicant seeks to appropriate is legally available in the proposed source of supply.

CONCLUSIONS OF LAW

18. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (DNRC Final Order 1992).

19. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005))(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

20. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 17)

Adverse Effect

FINDINGS OF FACT

21. The Applicant proposes to divert 12.0 AF of surface water from Unnamed Tributary of Casino Creek by means of an on-stream dam. Pursuant to ARM 36.12.113(5), no flow rate is required for on-stream reservoirs. The volume of 0.17 AF will be required for the livestock purpose of 10 AU, 4.8 AF will be required to compensate for evaporation (3.17' evaporation * 1.5 AF) as required by ARM 36.12.113, and the remaining 7.0 AF will be required for fishery. The Applicant has acknowledged that "In the event of a water shortage or a seniority call by downstream appropriators in Casino Creek, impounded water will be pumped, or siphoned, over the dam to discharge water into the stream below to balance in and outflow". The proposed place of use is the actual reservoir. There is a screened culvert in the dam design that allows water to bypass and be released.

22. The volume of water consumed per year is equal to the sum of evaporation 4.8 AF and 0.17AF consumed for livestock for a total of 4.97 AF consumed and with 7.0 AF diverted and not consumed.

23. The Department finds the proposed project will not result in adverse effect to senior surface water appropriators on the proposed source of supply or to water users located downstream of its confluence with Casino Creek.

CONCLUSIONS OF LAW

24. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

25. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. *Id.* ARM 36.12.120(8).

26. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. *Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

27. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” *See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston* (1991), 249 Mont. 425, 816 P.2d 1054.

28. It is the applicant’s burden to produce the required evidence. *E.g., Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. *Bostwick Properties, Inc.* ¶ 21.

29. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

30. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 21-23)

Adequate Diversion

FINDINGS OF FACT

31. Water for stock and fishery will be diverted from Unnamed Tributary of Casino Creek by means of an earthen dam. The dam will be 12 feet high and approximately 60 feet across. The dam will have a screen-protected culvert built into it to allow for water to pass through so the entire tributary will not be impounded.
32. The reservoir has a surface area of 1.5 acres and a capacity of 7.2 AF. This reservoir capacity does not qualify to be classified as high hazard pursuant to ARM 36.14.201.
33. The source of the reservoir will be an Unnamed Tributary of Casino Creek. The volume of the water use by stock and fish will be entirely within the reservoir.
34. The Department finds the proposed diversion dam adequate to supply the requested appropriation of 11.97 AF of water total, including 0.17 AF of stock water and 7.8 AF for the fishery purpose including a net evaporation of 4.8 AF.

CONCLUSIONS OF LAW

35. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.
36. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.
37. Whether party presently has easement not relevant to determination of adequate means of diversion. *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989).
38. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

39. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 31-34).

Beneficial Use

FINDINGS OF FACT

40. The Applicant proposes to use a volume of 11.97 AF water for stock (0.17 AF) and fishery (11.8 AF) purposes which are beneficial uses under the Montana Water Use Act.

41. The requested volume of 11.97 AF is based on a depth of 12' with a surface area of 1.5 acres and a capacity of 7.2 AF so that fish may overwinter. The proposed reservoir shoreline will be contoured to be accessible to livestock.

42. The 11.8 AF volume requested for the fishery purpose includes evaporation losses estimated at 4.8 AF based on data collected from Lewistown, MT Municipal Airport by the Western Regional Climate Center (and using the Penman/Linacre procedure).

43. The Applicant calculated the volume requested by multiplying planned reservoir depth and surface area by 0.4 as noted in the Form 600 SA Storage Addendum submitted with the application materials.

44. The Department finds the requested volumes of 0.17 AF for stock and 11.8 AF for fishery purposes are beneficial uses of water.

CONCLUSIONS OF LAW

45. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

46. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary

to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

47. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

48. It is the Applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

49. Applicant proposes to use water for stock and fishery which are recognized beneficial uses. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence fishery and stock are beneficial uses and that 11.97 AF of impounded water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 31-34).

Possessory Interest

FINDINGS OF FACT

50. The Applicant signed the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

51. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

52. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

53. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 50)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 41S 30154162 should be GRANTED.

The Department determines the Applicant may impound a volume of 11.97 AF of water from the Unnamed Tributary of Casino Creek from January 1 to December 31 by means of a dam located in the SWNWNW of Section 16, T14N R18E, in Fergus County for stock (0.17 AF) and fishery (11.8 AF) purposes. The place of use is a 7.2 AF-capacity reservoir located in the SWNWNW of Section 16, T14N R18E.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 14th of November 2022.

/Original signed by Steven B Hamilton/
Steven B. Hamilton, Regional Manager
Lewistown Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 14th day of November 2022, by first class United States mail.

STEVE & KRISTY MORGAN
4802 CASINO CREEK RD
LEWISTOWN, MT 59457

Matt Schmidt, (406) 535-1924